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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

AYLEEN JAMES,

Petitioner,

vs.

NEWSWEEK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff, who had two pending employment discrimination complaints with the EEOC, engages in protected activity under Title VII of the Civil Rights Act of 1964 by telling management that her performance evaluation was unfair and she would seek "justice"?

LIST OF PARTIES

All parties in the courts below are listed in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ayleen James, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at 2000 WL 536409 (2d Cir. May 2, 2000) and is reproduced in the Appendix at App. A-1. The district court issued a written opinion which is reported at 1999 WL 796173 (S.D.N.Y. Oct. 4, 1999). This opinion is reproduced at App. A-5.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 2, 2000. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees .... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

A. *Background*

In 1972, respondent, Newsweek, Inc., hired petitioner, Ayleen James, a black woman partially of Panamanian ancestry,

as a Researcher (Editorial Assistant) for the magazine. (JA 4).[1] Between January 1, 1980 and December 10, 1994, James served as a Writer/Researcher (Senior Editorial Assistant) in the Foreign section of the magazine. (JA 4-5). James applied for a series of positions from 1992 through 1994. Repeated denials of promotional opportunities caused her to file discrimination complaints with the Equal Employment Opportunity Commission.

B. *EEOC complaints*

On July 27, 1993, James filed an EEOC complaint alleging she was discriminatorily denied a promotion the prior November to the position of Associate Editor/Lifestyles section and denied a bureau internship in May 1993. (JA 324-25) ("Charge I").

On March 29, 1994, James filed an EEOC complaint alleging she was denied a promotion to the positions of State Department Correspondent and Reporter for the Nation and Lifestyles sections in retaliation for filing Charge I. (JA 326) ("Charge II"). The EEOC issued "right-to-sue" letters in October 1995 and July 1996. (App. A-17).

Respondent did not assert in the courts below that petitioner filed either EEOC complaint in bad faith.

C. *Events leading up to James' termination*

On June 1, 1994 James met with her superior, Ann McDaniel, to discuss why petitioner had not received a desired writing internship and why Newsweek had refused (for the fourth year in a row) to send her to the National Association of Black Journalists Conference that summer. (JA 381 ¶ 13(d)).

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[1] "JA" refers to the Joint Appendix filed in the Court of Appeals.

At this meeting, McDaniel explained that James was not a good ambassador for Newsweek because, *inter alia*, she had complained about the company and had a bad attitude. (JA 382 ¶ 13(d); JA 361 ¶ 89).

On December 9, 1994, James again met with McDaniel and another superior, Jolie Solomon, to discuss her work performance. McDaniel gave James her performance review for 1994, and did not tell James she was being terminated. Instead, McDaniel invited James to another meeting on January 25, 1995 to discuss further her performance. (JA 384 ¶ 17; 152 ¶ 42).

At the December 9 meeting, McDaniel acknowledged that James' comments about lack of input, one-way "conversations" and researchers being excluded from any meaningful role were correct and that she and Solomon would change things. (JA 385 ¶ 17). McDaniel acknowledged that James thought she was "not being treated well." (JA 178).

McDaniel also that James would continue working at Newsweek, stating, "*[i]f in the future* you can't engage in those conversations, you will be terminated." (JA 174) (emphasis supplied). McDaniel added, "we're going to have the meetings. . . . It's an effort to give you the opportunity to learn from the mistakes you've made in the past and the mistakes you'll possibly make in the future." (JA 178-79). In ending the meeting, McDaniel stated, "I really don't have anything left to say. My feeling is that this has not been a constructive conversation about your work. *I have scheduled, as you can see, at the bottom of the review, another session for 4 p.m. on January 25.*" (JA 385 ¶ 17; JA 178) (emphasis supplied).

The next day, December 10, James approached Solomon and said her performance evaluation was unfair and she would

seek justice. (JA 385-86 ¶ 18). Solomon reported this conversation to McDaniel. (JA 194 ¶ 3; JA 153 ¶ 44). McDaniel knew that James had complained about her performance review and promised to seek "justice." McDaniel attested that Solomon reported that James had made derogatory statements and threatened McDaniel. (JA 153 ¶ 44; JA 79-80 ¶ 22; 194 ¶ 3). James flatly denied threatening anyone. (JA 386 ¶ 18).

After James spoke with Solomon, McDaniel decided to fire James "based on Ms. James' conduct on December 9 and 10, combined with her long-term inadequate job performance and her refusal to engage in constructive discussions about her work and to accept and address criticisms." (JA 80; JA 88). James denied engaging in any disruptive behavior on December 9 or 10. (JA 384-86).

D. *Third EEOC Complaint*

On February 9, 1995, James amended Charge I and filed it with the EEOC and SDHR alleging she was fired on December 10, 1994 in retaliation for filing Charges I and II and on account of her race and age. (JA 327).

E. *Prior proceedings*

Asserting that respondent violated her rights under Title VII of the Civil Rights Act of 1964, petitioner filed suit in the United States District Court, Southern District of New York, asserting, *inter alia*, that Newsweek had unlawfully retaliated against her for protesting discriminatory activity.

At the close of discovery, Newsweek moved for summary judgment. By decision dated October 4, 1999, the district court (Hon. Loretta A. Preska) granted that motion in its entirety. (App. A-5).

Dismissing James' retaliation claim, the district court noted that James was fired on December 10, 1994, "a year and a half after the first EEOC charge and nine months after filing her second charge. Because the adverse employment action occurred so long after the protected activity, that indirect evidence does not support an inference of a causal connection. No other evidence has been presented to support this claim." (App. A-41).

Petitioner appealed Judge Preska's ruling on the retaliation claim. In a summary order, the Second Circuit affirmed, stating, James "points to her testimony that the day before she was fired, she told a supervisor that she did not believe 'her evaluation was fair' and that she was 'going to seek justice.' James contends that these comments constituted protected activity within the meaning of Title VII because they indicated her intention or willingness to seek legal redress for alleged discrimination." (App. A-3).

After summarizing the elements of a *prima facie* case of retaliation and noting that "[a]n informal complaint to a supervisor can constitute a protected activity under Title VII," the court held, "James's veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination. It cannot be expected that employees will be content with negative employment reviews, consider them just, and take them lying down. Here, James did not say — directly or indirectly — that she was being unfairly treated on account of her race, color, religion, sex, national origin or age. '[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII.'" (App. A-3–A-4) (citing *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998)).

REASONS FOR GRANTING THE WRIT

Title VII prohibits retaliation against employees who oppose discrimination in good faith. The context of the employee's opposition is crucial in determining whether she engaged in protected activity. In holding that James' "veiled and ambiguous remark is insufficient to support the inference that she was complaining about alleged discrimination" (App. A-3), the Second Circuit misinterpreted Title VII and overlooked inter-Circuit and Supreme Court authority requiring a full examination of the context of an employee's statements in determining whether she engaged in protected activity.

When management met with James on December 9, 1994 to discuss her job performance, she had already filed two EEOC charges. The next day, James told a superior that her performance review was unfair and she would seek justice. Although, on the previous day, her superiors had contemplated James' retention, they fired her after she vowed to seek justice, a plain reference to the EEO process. Had the Second Circuit followed inter-Circuit and Supreme Court authority governing the proper interpretation of employee comments, it would have held she engaged in protected speech and remanded for a trial on the merits. Certiorari is warranted.

THE COURT BELOW IGNORED INTER-CIRCUIT AND SUPREME COURT AUTHORITY REQUIRING THE COURT TO CONSIDER THE CONTEXT OF AN EMPLOYEE'S STATEMENTS IN DETERMINING WHETHER SHE ENGAGED IN PROTECTED ACTIVITY IN A RETALIATION CASE

It is settled that Title VII's anti-retaliation provision is not limited to formal discrimination complaints; it also protects employees who assert they are seeking "justice" in the wake

of two EEOC complaints. "The phrase 'opposed any practice' encompasses an individual's complaints to supervisors regardless of whether she files an EEOC charge." *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (2d Cir. 1993). *See also*, *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990) (protected activity under Title VII includes, *inter alia*, "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges").

This Court has never resolved the issue presented here: what constitutes protected activity to invoke the Title VII's "opposition" clause? However, inter-circuit authority requires courts to consider the context of an employee's opposition in determining whether she engaged in protected activity. For example, in *Booker v. Brown and Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), citing cases from the First, Fifth, Seventh and Ninth Circuits, the Sixth Circuit counseled that courts should balance the employee's right to protest discriminatory activity with the employer's entitlement to an efficient workplace:

> Courts are required to balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. . . . The requirements of the job and the tolerable limits of conduct in a particular setting must be explored. There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not

> covered. . . . An employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals.

Id. at 1312 (*citing Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *Rosser v. Laborers' Intern. Union*, 616 F.2d 221, 223 (5th Cir. 1980); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) and *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985)).

Consistent with the above cases, in *E.E.O.C. v. Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983), sustaining a Title VII retaliation claim, the Ninth Circuit examined expressive activity in its proper context. In that case, the defendant's employees wrote Zellerbach's client, a school district, that "racism and discrimination were prevalent at the Zellerbach Paper Company." As the Ninth Circuit noted, the letter "does not fit the classic mold of protected opposition to an unlawful employment practice" since it "did not protest any specific instant or instances of unlawful discrimination" and it "was primarily worded as a protest against the presentation of [an award to] a Zellerbach employee, and only secondarily as an objection to Zellerbach's policies themselves." Also, "the letter was directed to an outside party rather than to a Zellerbach decisionmaker or government official entrusted with responsibility for enforcing the equal opportunity laws." *Id.* at 1012.

Although the Ninth Circuit noted that "a simple assertion that an employer is personally bigoted, without more, is not statutorily protected opposition to an 'unlawful employment practice[,]' [i]n this case *the assertedly unlawful employment practices protested by the appellants could be discerned from the context of the letter*. The letter specifically mentioned the

history of unlawful employment practice charges filed against Zellerbach by black employees pursuant to Title VII. It stressed that Zellerbach had engaged in a continuing series of unlawful discriminatory employment practices, and that, if school district officials had consulted the entire record, they would have discovered the persistent complaints about these practices." *Id.* at 1013 (emphasis supplied).

Likewise, in *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), the Fifth Circuit affirmed the district court's holding that the plaintiff had engaged in protected activity by protesting his employer's failure to afford blacks adequate employment opportunities.

Like *Crown Zellerbach Corporation*, the *Payne* court examined the plaintiff's protest activity in context. In *Payne*, the employer "conten[ded] that the boycott and picketing were conducted to publicize the issues of integration of public facilities and common courtesy to blacks." However, "[a]lthough the Improvement Organization was, in part, occasioned by the position of blacks in Winnsboro in general, and although the boycott and picketing may have been to some extent a protest of this position, the district court's conclusion that the boycott and picketing activity was in opposition to unlawful employment practices of McLemore's is supported by substantial evidence." *Id.* at 1137 n.7.

Importantly, in comparable First Amendment retaliation cases, Supreme Court authority requires courts to consider the context of an employee's speech. In *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), this Court stated, "[w]hether an employer's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."

This Court applied *Connick* in *Rankin v. McPherson*, 483 U.S. 378 (1987) and *Waters v. Churchill*, 511 U.S. 661 (1994).

In *Rankin*, upon hearing that President Reagan had been shot, the plaintiff said to a colleague, "if they go for him again, I hope they get him." 483 U.S. at 381. Holding that the plaintiff had engaged in protected speech, this Court reasoned, "[c]onsidering the statement in context, as *Connick* requires, disclosed that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. § 871(a) or 18 U.S.C. § 2385, or, indeed, that could properly be criminalized at all." *Id.* at 387.

Accordingly, while, on its face, McPherson's comment had little social value, in context, the plaintiff had engaged in protected speech by addressing matters of public concern.

In *Waters*, this Court further emphasized the importance of considering the public employee's speech in context. This Court stressed that, in resolving whether a public employee could be disciplined for speaking out, the court should consider whether the employer reasonably understood what the plaintiff had actually said. In other words, the context of the plaintiff's speech is crucial.

> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and

> procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision — discharge, suspension, reprimand, or whatever else — of the sort involved in the particular case. . . . Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable. 511 U.S. at 677-78.

Here, the Second Circuit ignored the context in which James vowed to seek justice, ignoring inter-circuit and Supreme Court authority requiring courts to review an employee's comments in their totality. *See also*, *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) ("it has been long established that Title VII, as remedial legislation, is construed broadly. This directive applies to the reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters"); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-50 (1986) (elementary summary judgment principles require courts to view the record in the light most favorable to the non-moving party and to draw all reasonable inferences in her favor).

Only a few months before James was fired, McDaniel said James could not represent Newsweek at a conference of black journalists because she had complained about the company and had a bad attitude. (JA 381 ¶ 13(d); JA 361 ¶ 89). This comment was a not-too-subtle reference to James' two pending EEOC complaints protesting what she reasonably believed were discriminatory promotion denials. Indeed, at the December 9, 1994 meeting, McDaniel acknowledged

that James thought Newsweek was not treating her fairly. (JA 178). These EEOC complaints place in full context James' objection to the unfair performance review and her vow to seek "justice."

Applying the correct standard, a jury may plainly conclude that management understood that, in vowing to seek "justice," James would either prosecute her EEOC complaints or file another complaint, or both, especially since her comment was a plain reference to the legal process. *See*, Webster's New World Dictionary, Third College Edition, at 734 (defining "justice" as, *inter alia*, "the use of authority and power to uphold what is right, just or lawful" and "the administration of law; procedure of a law court").

Accordingly, certiorari is warranted to resolve the inter-circuit split governing the interpretation of an employee's protests in Title VII retaliation cases and to conform the Second Circuit to the jurisprudence in comparable First Amendment cases.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: July 27, 2000
Goshen, New York

Respectfully submitted,

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